

SUPREME COURT OF NIGERIA
FRIDAY 26TH FEBRUARY, 2016. SC. 38/2005
CORAM:- S. GALADIMA, M. U. PETER-ODILI, K. M. O.
KEKERE-EKUN, J. I. OKORO, A. SANUSI, JJSC

EVELYN EHWRUDJE APPELLANT
AND
1. WARRI LOCAL GOVERNMENT
2. COMFORT NIKORO RESPONDENTS

PROPERTY LAW - Possession - Stall - Even though appellant was in possession at a time - It does not translate to both parties being in concurrent possession - As actual possession was found to be in 2nd respondent (H1)

EVIDENCE - Evaluation - CA findings that Exhibit M was evaluated along side other pieces of evidence cannot be faulted - As the Exhibit being all appellant is hanging on - Cannot confer possession (H2)

PROPERTY LAW - Trespass - Injunction - Stall - Once infringement of right to possession is established - And court makes findings thereof - Remedy of a grant of injunction would naturally follow (H3)

PROPERTY LAW - Relief - Right to - Right to remedy of respondents is not defeated - Merely because they had claimed possession and damages for trespass - As the claims where made in one suit - Is not defeated by their being lumped up (H4)

FACTS

This action was commenced by plaintiffs/respondents against defendant/appellant at the Magistrate Court Holden at Warri. Respondents claim the following reliefs inter alia, perpetual injunction to restrain appellant from further trespassing on the property in dispute, order for possession in favour of 2nd respondent and damages in favour of 2nd respondent for trespass committed on the disputed property. The contention of respondents is that all the stalls at Igbudu Market Warri belong to 1st respondent and that 2nd respondent is the tenant of 1st respondent occupying the property in dispute. Some-

1564 Ehwrudje v. Warri Local Govt. (2016) 2 KLR (pt. 382) 1563;
time in 1987, 2nd respondent temporarily allowed appellant the use of her stall. 2nd respondent upon her return in 1988 to take possession, approached appellant to pay rent for the stall. The demand was rebuffed by appellant who in turn claimed ownership of the stall. 2nd respondent reported the matter to 1st respondent, who invited both parties to resolve who the rightful owner is.

At the meeting, 2nd respondent had evidence to show possession and appellant had nothing to show. Consequently, 1st respondent issued a quit notice to appellant to give up vacant possession. The notice was not complied with. Hence, the action was instituted at the court. On the other side, appellant claimed to be a yearly tenant who is entitled to a six months notice to quit. Appellant argued further that since there was no evidence of such notice the case of respondents would not be sustained, since the notice was a mere 7 days one. Hearing commenced in the matter and at the end of which the court made an order of non-suit on the ground that 1st respondent had agreed to reallocate two new stalls to either party. Aggrieved, respondents appealed to the High Court of Delta State, Warri. The Court set aside the decision of the trial Magistrate Court and found in favour of 2nd respondent. Dissatisfied, appellant appealed to the Court of Appeal Benin City. The Court affirmed the judgment of the High Court and being further aggrieved, appellant has appealed to the Supreme Court.

ISSUE FOR DETERMINATION

“Whether the Court of Appeal was right in affirming the judgment of the High Court granting an Order of possession and injunction in favour of the 2nd Respondent in respect of the property in dispute”.

HELD (Unanimously dismissing the appeal per **PETER-ODILI JSC**)

PROPERTY LAW - Possession

1. Again to be noted that even though at some point the Appellant was in occupation, it does not translate to the two parties being in concurrent possession. This is because as the two Courts, High Court and Court of Appeal found that actual possession was in the 2nd Respondent whether de jure

or de facto, physical or constructive the possession claimed by the Appellant is excluded. This situation is enhanced with the denial by the Appellant of the ownership of the 2nd Respondent which confrontation vitiated the lawfulness of her original entry. The position is what the law has prescribed even though the 2nd Respondent was not in physical possession at the time of the institution of the suit as it is that challenge that has created her constructive possession which is due to the misconduct of the Appellant. (p. 1578 E)

EVIDENCE - Evaluation

2. On Exhibit “M”, the allocation register, the Appellant argued that the High Court did not accord it the pride of place it deserved as the Appellant’s name was there as tenant. That if it had been properly evaluated, it would have been favourable to the Appellant. The Court of Appeal disagreed with this submission on the ground that it was placed alongside the other pieces of evidence especially since the 2nd Respondent’s witnesses denied knowledge of the name of Appellant in that Register and also did not know her as their tenant. This summation cannot be faulted since Exhibit “M” is all the Appellant hung on, which on its own alone cannot confer possession of the disputed stall. It came from a source unknown to 1st Respondent. (p. 1578 H)

Trespass - Injunction

3. Also to be tackled is the angle taken by the Appellant that since the High Court did not find an action in trespass proved and no damages established either, that the injunction would not lie. That is an erroneous assertion in that once the infringement of the right to possession of the 2nd Respondent was established and the Court made a finding thereof, the remedy of a grant of injunction would naturally follow. (p. 1579 C)

PROPERTY LAW - Relief - Right to

4. The right to remedy of the Respondents would not be scuttled merely because they had at the Court of first instance put up a claim for possession, damages for trespass and in-

junction. Though acknowledged that possession on the one hand and damages for trespass and injunction in one suit are mutually exclusive, a claim for injunction and possession in one suit would not be defeated because the claims are lumped together.

B ***The correct position on the issue of joinder whereby possession and trespass being found in the same suit no longer fatal is to underscore the superiority of substance above technicality in ensuring that justice is served and not crucified on the altar of formality.*** (p. 1579 D)

C

NOTABLE POINT OF INTEREST

PETER-ODILI JSC

1. Magistrate Court - Summary jurisdiction

D The Court of Appeal had also considered whether the real issues in controversy between the parties were addressed and if at any point, the High Court went outside it. In doing this, the Lower Court called attention to the fact that the matter originated from the Chief Magistrate Court where pleadings are not part of the procedure as the needful therein is, the wrong and the remedy covered by law. In this regard, that position cannot be faulted as the Appellant is asking for a standard outside the jurisdiction of the first port of call of this matter, a Court of summary jurisdiction where the formalities of pleadings are absent. All that is required is that the matter that has been so commenced is one within the ambit of the necessary legislation and the evidence proffered to bring to light the facts and thereby tilt the balance of probability one way or the other. (p. 1576 A)

E

F

G **REPRESENTATION**

CHIEF A. A. OSAWOTA, for the Appellant

OLUMIDE AJU for 1st Respondent

KUNLE EDUN for 2nd Respondent, for the Respondents

H **CASES REFERRED TO**

Pan Asian African Co. Ltd. v. NICON (1982) 9 SC 1

Awe v. Saidi (1969) NSCC 426

Okafor v. A. G. Anambra State (2001) FWLR (pt. 58) 1127

Adone v. Ikebodu (2001) FWLR (pt. 72) 1893

Nwadiogbu v. Nnadozie (2001) FWLR (pt. 61) 1625

Strabag Const. Nig. Ltd v. Adeyefa (2001) FWLR (pt. 60) 1545

Iko v. State (2001) FWLR (pt. 68) 1161

Okosi v. State (2001) FWLR (pt. 68) 1161

Akeredolu v. Akinremi (1989) 3 NWLR (pt. 180) 164

B

Okoya v. Santili (1994) 4 NWLR (pt. 338) 256

Balogun v. Labiran (1988) 3 NWLR (pt. 80) 66

Adeniyi v. Ogunbiye (1965) NMLR 395

Fufai v. Igbirra Native Authority (1957) NRNL 178

C

Ude v. Chimbo (1998) 12 NWLR (pt. 577) 169

Adeniyi v. Ogunbiyi (1965) NMLR 395

STATUTES REFERRED TO

Recovery of Premises Law Cap. 142 Laws of Bendel State (applied to Delta State)

LEAD JUDGMENT BY PETER-ODILI JSC

This is an appeal against the judgment of the Court of Appeal, Benin Division or Court Below or Lower Court for short wherein the learned Justices delivered a judgment in favour of the 2nd Respondent on the 11th day of February, 2005.

FACTS:

The facts as put forward by the Respondents are that the 1st Respondent was at all material times the owner of all the stalls at Igbudu Market, Warri and the 2nd Respondent its tenant of Shed No. 1052 (formerly known as Shed No. 1338). At sometime in 1987, the 2nd respondent allowed the Appellant the use of the stall when she had to leave Warri to tend her child who was ill at the time and on her return in 1988 in the month of December she went to the Appellant to demand for rent. This demand was rebuffed by the Appellant who in turn claimed ownership of the stall whereby the 2nd Respondent reported the development to the 1st Respondent who invited both parties to resolve who the rightful owner could be. At this meeting, the 2nd respondent had evidence to show possession and the appellant had nothing to show and so the 1st respondent issued a quit notice to the Appellant to give up vacant possession which she refused to comply at which the Respondents insti-

tuted an action against the Appellant at the Magistrate Court claiming the following reliefs:-

1. Perpetual injunction to restrain the Defendant by herself/ her servants/agents and/or privies from further trespassing or otherwise howsoever from remaining on or continuing in occupation of
B the said shed No. 1052 at Igbudu Market, Warri.

2. An Order for possession in favour of the 2nd Plaintiff of the said Shed No. 1052 at Igbudu Market Warri.

3. N2,500 damages in favour of the 2nd Plaintiff for trespass
C for the said Shed No. 1052 at Igbudu Market, Warri.

The version of the Appellant is that she is a yearly tenant because the tenancy purportedly conferred on the Appellant is yearly in nature attracting a notice of 6 months and since there was no evidence of such notice the case of the Respondents would not be
D sustained, since the notice was a mere 7 days one.

After taking evidence from both sides, the learned chief Magistrate on the 15th day of February, 1991 delivered the judgment and made an Order of non-suit on the ground that the 1st Respondent had agreed to reallocate two new stalls to either party. The Respondents being dissatisfied appealed to the High Court. The High Court set aside the decision of the Chief Magistrate Court and found in favour of the 2nd Respondent and thereby aggrieved the Appellant appealed to the Court of Appeal which affirmed the judgment of the High Court and further aggrieved, the Appellant has approached
F this Court.

On the 30th day of November, 2015, learned counsel for the Appellant, Chief A. K. Osawota adopted the Brief of Argument filed on the 30th October, 2008 in which were identified three issues for
G determination which are as follows:-

(A) WHETHER THE CASE PUT FORTH AT THE TRIAL WAS NOT THAT OF RECOVERY OF PREMISES WITH REGARDS TO THE EVIDENCE ADDUCED?

(B) WHETHER THE COURT OF APPEAL WAS RIGHT TO
H HAVE AFFIRMED THE HIGH COURT'S JUDGMENT GRANTING THE RESPONDENT, PARTICULARLY THE 2ND RESPONDENT, WHAT THEY NEVER CLAIMED?

(C) WHETHER THE FAILURE OF THE COURT OF APPEAL TO HOLD THAT NON CONSIDERATION OF EXHIBIT "M", TEN-

DERED BY THE APPELLANT, WAS A FUNDAMENTAL OMISSION THAT HAS OCCASIONED MISCARRIAGE OF JUSTICE IN VIEW OF ITS PROBATIVE VALUE, IS NOT ITSELF COUPLED WITH THE FINDINGS OF THE COURT OF APPEAL A MISCARRIAGE OF JUSTICE?

Learned counsel for the 1st Respondent, Olumide Edu Esq. B adopted its Brief of Argument filed on the 6th day of August 2015 and distilled a single issue for determination which is:-

"Whether the Court of Appeal was right in affirming the judgment of the High Court granting an Order of possession and injunction in favour of the 2nd Respondent in respect of the property in dispute". C

Mr. Kunle Edun, learned counsel for the 2nd Respondent adopted her Brief of Argument settled by Chief Fedude Zimughan, filed on 30th October, 2007 and deemed filed on 11/1/2012. He D formulated two issues for determination which are thus:-

"1) Having regard to the claim of the Respondents and evidence adduced at the trial was the Court of Appeal right in affirming the judgment of the High Court?"

2) Whether the Court of Appeal inadequately evaluated Exhibit 'M' as to occasion a miscarriage of justice." E

I see the sole issue as crafted by the 1st Respondent apt and sufficient in itself to be utilised in determining the appeal and so I shall use it.

SOLE ISSUE: F

"Whether the Court of Appeal was right in affirming the judgment of the High Court granting an Order of possession and injunction in favour of the 2nd Respondent in respect of the property in dispute". G

Arguing on the standpoint of the Appellant, Chief Osawota of counsel submitted that the Respondents did not adduce any evidence of trespass in support of their claim and that there was sufficient from which the Lower Court would have been informed that the issue before it was essentially recovery of premises as Appellant was a yearly H tenant and ought to have been given a six months notice to quit, failure of which was fatal to the case of the Respondents. He cited Pan Asian African Co. Ltd v. NICON (1982) 9 SC 1 at 71 - 72; Awe v. Saidi (1969) NSCC 426.

That Exhibit “G”, the quit notice was far short of the statutory requirement and that the Respondents’ claim essentially and fundamentally is anchored on trespass and a failure of the other remedies sought, which are ancillary in nature. Learned counsel further contended that at the trial the Respondent wholly abandoned their claim for trespass and put up a radically different case of recovery of premises. That an application for an injunction being an equitable relief must first establish an actionable wrong by proving that there was an infringement of his right and so the principal claim being trespass has to be established first before the accessory right of injunction can be granted. Also that in this instance of trespass, the onus is on the Plaintiff/Respondent to prove ownership and/or exclusive possession and not qualified possession. He relied on the cases of *Okafor v. A. G. Anambra State* (2001) FWLR (pt. 58) 1127 at 1133; *Adone v. Ikebudu* (2001) FWLR (Pt. 72) 1893 at 1900; *Nwadiogbu v. Nnadozie* (2001) FWLR (pt. 61) 1625.

Learned counsel for the Appellant went on to state that Appellant led undisputed evidence of being the bona fide occupant/tenant of the said stall No. 1052 and the non-disputation evidence particularly exhibit ‘M’ which means admission by the Respondents and so the Respondents are precluded from denying the transaction or the allocation List/Register which had the Appellant’s name as occupant and so the evaluation of the evidence and ascription of probative value to same being the primary function of the trial Court its conclusion thereby cannot be faulted. He cited *Strabag Construction Nig. Ltd v. Adeyefa* (2001) FWLR (Pt. 60) 1545; *Iko v. The State* (2001) FWLR (Pt. 68) 1161 at 1171.

Chief Osamota for the Appellant contended that the Lower Court was wrong in affirming the High Court’s judgment for in doing so acted in excess of its jurisdiction and outside the original case of the parties which anomaly this Court should rectify by setting that judgment aside. He cited *V.S.S. Ltd v. Government of Anambra State* (2001) FWLR (Pt. 66) 697 at 699.

It was also submitted for the Appellant that the High Court in appraising the evidence in the record did advert its attention to the important document, exhibit ‘M’ as it was in as good a position as the trial/Lower Court to evaluate evidence which had been given in a case and did not need to rely on the credibility of witnesses to make

the necessary inference and do that which the trial Court would have done. He cited *Okosi v. State* (2001) FWLR (pt. 68) 1161 at 1171.

Countering the submissions of the Appellant, learned counsel for the 1st Respondent, Mr. Olumide Aju called the Court's attention to the concurrent findings of the two Courts below, High Court and Court of Appeal which ought not to be disturbed as there is nothing perverse or a miscarriage of justice occasioned upon which an interference would be justified. He cited *Akeredolu v. Akinremi* (1989) 3 NWLR (Pt. 180) 164; *Okoya v. Santili* (1994) 4 NWLR (Pt. 338) 256 at 302.

He stated that exhibit 'M' was wrongly admitted and should be discountenanced. That assuming it was properly admitted, it cannot be proof of a tenancy relationship and did not occupy the prime of place the Appellant is asserting.

For the 2nd Respondent, it was submitted that the High Court found that the 2nd respondent proved her claim on the balance of probability and so entitled to judgment. That as found by the High Court that where there are two conflicting claims to possession on the same piece of land the party with the better title won. He cited *Balogun v. Labiran* (1988) 3 NWLR (Pt. 80) 66.

That the 2nd Respondent having been in possession of the said shed and allowing the Appellant a brief use of same the refusal of the appellant to vacate on 2nd respondent's demand, claiming to be owner of the stall amounted to misconduct and thereby vitiated the lawfulness of her original entry. He stated that though 2nd Respondent was not in physical possession at the time of institution of the suit, she became in constructive possession as soon as she was entitled to possession and entered in assertion of that possession. He cited *Adeniyi v. Ogunbiye* (1965) NMLR 395 at 397.

It was also contended that the High Court decision that the action of the Respondents was not founded on trespass as such and damages not proved is not a bar in granting injunction. Also that the claim of the Respondents would not justify the application of the Recovery of Premises Law Cap. 142 Laws of Bendel State (applicable to Delta State. He cited *Fufai v. Igbirra Native Authority* (1957) NRNLR 178.

That the application of Recovery of Premises Law presupposes the existence of landlord and tenant relationship and so the issuing of

Exhibit “G” by the 1st Respondent to the Appellant cannot create a relationship that does not exist and a squatter not covered by the said Law.

The summary of the dispute between the Appellant on the one side and the Respondents on the other can be spelt out briefly as follows:-

For the Appellant, that the claims of the Plaintiffs/Respondents in possession and injunction are bad in law and the High Court and Court of Appeal were wrong to grant reliefs outside the claims of the plaintiffs thereby making a case different from what the parties were disputing over. Also that there was improper evaluation of Exhibit “M” by the Court of Appeal as it ought to have operated as estoppel and that failure of proper appraisal occasioned a miscarriage of justice.

The Respondents taking an opposing view contend that the reliefs were consistent with the claim and a Court can formulate issues in the interest of justice as long as they pose and answer the question in controversy between the parties. Also that the claim of the Respondents is essentially that of recovery of premises even though there was no landlord and tenant relationship between 1st Respondent and Appellant and so the non-issue and service of statutory notice in a tenancy relationship is not fatal in this instance. Also that Exhibit “M” was not crucial enough to change the status quo or the relationship of landlord and tenant that existed between the 1st and 2nd Respondent since there was reason for the presence of the Appellant in the property.

At this stage I see the necessity to get back to what the Courts below did and I must say, the Court of Appeal did a great job of not only tracing the journey of this matter up to that point but evaluated the records before it. I shall therefore quote extensively from that judgment from pages 139 to 142 of the Record per Aba Aji JCA and it is thus:-

“It was their original claim before the Court of trial. The finding by the Court below on the issue of trespass was that the case was not founded on trespass. It was a claim that was not established and therefore not granted to the Respondents. So the issue should not have arisen in this appeal. I rest the issue there.

What therefore was the claim of the Respondents before the

trial Court? Was the claim that of recovery of Premises? It was argued the stall was hired to the Appellant by the Respondents, that, that being the position, a sub-tenant of a substantive tenant is deemed in law to be tenant of the over lord, and that there was enough facts from the Lower Court from which the Court below would have been informed that the issue before it was essentially that of Recovery of B Premises. That the Recovery of Premises Law, Cap. 142 Laws of defunct Bendel State (applicable to Delta State) govern the relationship between the parties and that the Appellant as the tenant of the over lord is entitled to the privileges and preferences of a lawful tenant including issuance of statutory notices in the event of termination C of the tenancy and thus Exhibit G the quit notice issued to the appellant was far short of the statutory requirements citing PAN ASIAN AFRICAN CO. LTD v. NICON (supra) and Awe v. SAIDI (supra) and that the Lower Court by allowing the appeal has occasioned a mis- D carriage of Justice. It was therefore submitted that the issue before the trial Court was that of tenancy relationship as governed by the Recovery of premises Law (supra).

The Court below has succinctly put the case of the Respondents when it started in its judgment at page 75, lines 6 - 9 and 14 - E ?? 16 of the record as follows:-

I have to state that the case was not founded on trespass as such. It was primarily a claim for declaration that the 2nd Plaintiff was the tenant of the 1st Plaintiff and therefore entitled to possession of the said stall No. 1052... The claim before the Court is clear and the F dominant issue was between the 2nd Plaintiff and the Defendant, who was the rightful tenant of the 1st Plaintiff”.

When the 2nd Respondent allowed the Appellant use of the stall No. 1052, she did not allow her on the condition that she pays G rent even though it was in evidence before the trial Court that when she came back she went to the defendant and asked for rent. There was no evidence that she paid such rent to the 2nd Respondent. The evidence of PW1 and PW2 shows that there was not any relationship H between the 1st Respondent and the Appellant as they have denied ever giving the said stall to the Appellant. The over lord having denied categorically putting the appellant in possession of the stall, the question of Exhibit G the quit notice being inadequate does not arise as the quit notice itself is immaterial in the absence of any relationship

of landlord and tenant between the 1st respondent and the appellant. Further PW2 Newton Akuya whom the appellant claimed to have allocated the stall 1052 to denied categorically in his evidence before the trial Court that he ever allocated the stall in dispute No. 1052 to the appellant and maintained that stall No. 1052 belonged to the 2nd respondent”.

She stated on as follows:-

“Exhibit ‘M’ is also not sufficient to make the relationship of appellant and the 1st respondent that of landlord and tenant for the Court to invoke the provisions of the Recovery of Premises Law to govern their relationship. There is overwhelming evidence before the trial Court particularly the evidence of PW1 and PW2 whose testimonies have been reproduced above which establishes the fact that the appellant was never allocated the said stall in dispute, notwithstanding Exhibit ‘M’. The evidence of the 2nd respondent herself did not establish any form of relationship of landlord and tenant between her and the appellant. I am not therefore in agreement with the submission of the learned senior counsel for the appellant that from the facts of the case, the lower Court ought to have been informed that the Recovery of Premises Law determines the relationship between the parties. The claim before the Court is for possession and injunction. This is so notwithstanding the definition of tenant under Section 2 (i) of the Recovery of Premises Law to mean any person occupying the premises whether on payment of rent or otherwise. The definition of premises too does not include a stall or shed. I agree with the findings of the learned judge of the Court below that the case of the respondent was that the 2nd respondent was the tenant of the 1st respondent and therefore entitled to possession of the said stall”.

Going on further, the Court below stated, viz:-

“It does not follow that because the claim for damages fails, the claim for injunction must also fail. If a trespass is threatened, or reasonably apprehended and likely to occur, an injunction to restrain the defendants from committing a trespass may be granted, even though no trespass has been proved. In the instant case, the fact that the claim of the respondents was that of ownership of the stall in dispute, that is as to who between the appellant and the 2nd respondent was the Rightful tenant of the 1st respondent, and therefore

entitled to possession. The order for injunction therefore granted by the Court below was proper in the circumstances of this case notwithstanding the fact that at that material time, the 2nd respondent was in actual possession.

The law, in general, recognises two kinds of possession: actual possession and constructive possession. A person who knowingly had direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. In this case, an actual wrong was established by preponderance of evidence before the Court below by the 2nd respondent and it was upon such established facts that the Court made an Order of injunction. An actionable wrong was thus been proved by the respondents by establishing that there was an infringement of a right for redress by the Court and for which damages are not adequate remedy. The principal right has been established by a respondents and the grant of the necessary right of injunction was proper by the lower Court to protect the principal right of the respondents. The grant of injunction was right and proper in the circumstance of this case.

Exhibit 'M' as found is not sufficient to create a landlord and tenant relationship between the appellant and the 1st respondent. Exhibit 'M' was tendered in evidence through DW1 Jonathan Omode a trader at Igbudu Market. The appellant claimed that the council allocated the stall to her through one Newton Akuya. Newton Akuya testified as PW2. He denied such claim by the appellant. He stated that the stall in dispute belongs to the 2nd respondent and it is not true that he allocated the stall in dispute to the appellant. PW1, Daniel Igbinosun the market master testified that he went through the records but could not find the appellant's name. He stated that the appellant is not their tenant. The 1st respondent having categorically denied putting the appellant in possession of the stall, exhibit 'M' is not therefore sufficient to create any landlord tenant relationship between the appellant and the 1st respondent. It certainly cannot. From such overwhelming evidence before the Court of trial both oral and documentary, the claim before the Court is not that of recovery of premises as rightly found by the learned Judge of the Court below. The 2nd

1576 Ehwrudje v. Warri Local Govt. (2016) 2 KLR Peter-Odili JSC
respondent and not the appellant is the legal tenant of the stall 1052.
This issue one is thus resolved against the Appellant”.

The Court of Appeal had also considered whether the real issues in controversy between the parties were addressed and if at any point, the High Court went outside it. In doing this, the Lower Court called attention to the fact that the matter originated from the Chief Magistrate Court where pleadings are not part of the procedure as the needful therein is, the wrong and the remedy covered by law. In this regard, that position cannot be faulted as the Appellant is asking for a standard outside the jurisdiction of the first port of call of this matter, a Court of summary jurisdiction where the formalities of pleadings are absent. All that is required is that the matter that has been so commenced is one within the ambit of the necessary legislation and the evidence proffered to bring to light the facts and thereby tilt the balance of probability one way or the other.

A recast into the background of this matter seems a way to clarity. The subject matter is a market stall or shed No. 1052 previously numbered as 1338 at Igbudu Market, Warri in Warri South Local Government Area of Delta State wherein the 2nd Respondent as Plaintiff claimed at the trial Magistrate Court, perpetual injunction, possession and damages for trespass to the said shed. The radical title of the subject matter in dispute is the Warri Local Government now Warri South Local Government Area. At the Magistrate Court the Respondents as Plaintiffs called two witnesses with 2nd Respondent also testifying. The PW1, one Daniel Igbinosun the Market Master stated thus:- *“Defendant is not my tenant, there is nothing to show to that effect”*. See pages 21 - 22 of the record of Proceedings.

PW1 stated further:-

“I am a senior executive officer accounts attached to Warri Local Government Council, Warri. I know the 2nd Plaintiff. I know the Defendant. Sometime in 1989 the 2nd Plaintiff came to my office, she mentioned that her store No. 1052 allocated to her by the Council had been illegally occupied by someone, I asked the 2nd Plaintiff if the person was in the Market she said yes, I sent for the person and the person came. The person turned out to be the Defendant, after narrating what happened, she said she is the owner of the store. When I asked the Defendant for document to back up her assertion, she could not present any while the 2nd Plaintiff presented her own

documents. I went through the records, I could not find the Defendant's name."

One Newton Akuya also a Market Master of 1st Respondent testified as PW2 and he stated thus:-

"I have a letter Defendant wrote to me on the receipt of this letter; I went to the secretary Local Government Council. The secretary invited both parties, investigations commenced. A letter was in the end written to the Defendant to quit the stall. I know the stall in issue 2nd Plaintiff was one of those that built and had stall in the place in question. I know the stall that was assigned to the Plaintiff. Defendant was not asked to renovate any stall".

Under cross-examination, PW2 said:-

"The stall referred to in Paragraph 2 of Exhibit "A" belonged to the 2nd Plaintiff in 1986... It is not true that I allocated the above stall in question to the Defendant."

The 2nd Respondent testified as the 2nd Plaintiff at the trial Magistrate's Court to the effect that she has a stall in Igbudu Market which she allowed the Appellant to use when she had to leave Warri to take care of her daughter who was sick at the time. She left the store under the management of one Queen, who later introduced the Appellant to the 2nd Respondent as she was about going back to school. The 2nd Respondent reluctantly gave in to Queen's plea and allowed the Appellant to use the stall. She paid the stallage fees on the stall for the years 1986 and 1987 and tendered Exhibit "J" in proof of that fact. And when the market got burnt in 1987 she gave the Appellant the sum of N1,000.00 (One Thousand Naira) only to rebuild the stall. When she finally returned back to Warri in 1988 and in the month of December went to the Appellant to demand for rent, the Appellant there and then claimed that she has bought the stall from PW2. In support of her claim, the 2nd Respondent tendered Exhibits "K" and "L" which are receipts issued to her by the 1st Respondent for the stallage fees for 1989 and 1990 respectively and also Exhibit "N" which is the approval letter from the Council. She concluded her evidence in chief by asserting that:

"The stall in dispute is mine. I am a tenant to the Local Government Council".

The Appellant as Defendant testified in her own defence and called no witnesses asserting that she had been in the store since

1987 and paying ten Naira (N10) to PW2 who was market master at the time although she could not tender any receipts to back up her assertion of ownership of the stall or as tenant of the 1st Respondent.

The two conflicting claims to possession set the stage for the Court, firstly, the Magistrate Court up to the Apex Court to decide in whom the right to the stall resides. The Chief Magistrate Court found in favour of the Defendant/Appellant, a position rejected by the two Higher Courts thus producing the concurrent findings available to this Court.

The defence set up by the Appellant anchored on the application of the Recovery of Premises Law, presupposing the existence of landlord and tenant relationship between her and the 1st Respondent and therefore entitling her to the statutory quit notices which the 1st Respondent not having served with, would vitiate the claim of the Respondents to possession.

In the light of the above, the High Court held for the Respondents as affirmed by the Court of Appeal and that is that the better title was in the 2nd Respondent. The facts on ground levels the weight to those findings as I apply the principles embedded in *Balogun v. Labiran* (1988) 3 NWLR (pt. 80) 66.

Again to be noted that even though at some point the Appellant was in occupation, it does not translate to the two parties being in concurrent possession. This is because as the two Courts, High Court and Court of Appeal found that actual possession was in the 2nd Respondent whether de jure or de facto, physical or constructive the possession claimed by the Appellant is excluded. This situation is enhanced with the denial by the Appellant of the ownership of the 2nd Respondent which confrontation vitiated the lawfulness of her original entry. The position is what the law has prescribed even though the 2nd Respondent was not in physical possession at the time of the institution of the suit as it is that challenge that has created her constructive possession which is due to the misconduct of the Appellant. See *Ude v. Chimbo* (1998) 12 NWLR (Pt. 577) 169 at 190 194; *Adeniyi v. Ogunbiyi* (1965) NMLR 395 at 397.

On Exhibit “M”, the allocation register, the Appellant argued that the High Court did not accord it the pride of place

it deserved as the Appellant's name was there as tenant. That if it had been properly evaluated, it would have been favourable to the Appellant. The Court of Appeal disagreed with this submission on the ground that it was placed alongside the other pieces of evidence especially since the 2nd Respondent's witnesses denied knowledge of the name of Appellant in that Register and also did not know her as their tenant. This summation cannot be faulted since Exhibit "M" is all the Appellant hung on, which on its own alone cannot confer possession of the disputed stall. It came from a source unknown to 1st Respondent.

Also to be tackled is the angle taken by the Appellant that since the High Court did not find an action in trespass proved and no damages established either, that the injunction would not lie. That is an erroneous assertion in that once the infringement of the right to possession of the 2nd Respondent was established and the Court made a finding thereof, the remedy of a grant of injunction would naturally follow.

The right to remedy of the Respondents would not be scuttled merely because they had at the Court of first instance put up a claim for possession, damages for trespass and injunction. Though acknowledged that possession on the one hand and damages for trespass and injunction in one suit are mutually exclusive, a claim for injunction and possession in one suit would not be defeated because the claims are lumped together. See *Rufai v. Igbirra Native Authority* (1957) NRNLR 178, *Ibeziako v. Nwaobogu* (1972) 1 All NLR (pt. 2) 200; *Ezekwesili v. Onwuagbu* (1998) 2 NWLR (pt. 541) 217 at 224.

The correct position on the issue of joinder whereby possession and trespass being found in the same suit no longer fatal is to underscore the superiority of substance above technicality in ensuring that justice is served and not crucified on the altar of formality. See *Akano v. Okunado* (1978) 1 Law Report of Nigeria 130; *Ezekwesili v. Agbapuonwu* (2003) FWLR (pt. 162) H 2016 at 2051.

What this Court is called upon to do at this stage is to upturn the concurrent findings of the two Courts above the Chief Magistrate Court. What makes it an uphill task so to do is the fact that the find-

ings of the High Court and Court of Appeal were made from great industry in the consideration of the evidence, oral and documentary and there was no miscarriage of justice or any violation of some principles of law substantive or procedural and so a disturbance of those findings would have no leg on which to perch. This is because interference in what had been done by Courts below are not done at a whim or to display a better mastery of the law to possibly massage a bloated ego. That is not what is called for and so when the concurrent findings have been so excellently made as in the instant then this Court has no option than to tag along. See *Ezekwesili v. Agbapuonwu* (2003) FWLR (pt. 162) 2016; *Iwego v. Ezengo* (1992) 6 NWLR (pt. 2490) 651.

As I have tried to put down, it is clear that the issue for determination is from the foregoing resolved in favour of the Respondents and against the Appellant, I find no merit whatsoever in this appeal and so do not hesitate in dismissing it.

Appeal is hereby dismissed as I affirm the judgment of the Court of Appeal in its affirmation of the decision and orders of the High Court.

I award the sum of N100,000.00 to each of the two Respondents, to be paid by the Appellant.

GALADIMA JSC

This protracted case started at the Chief Magistrate Court Warri to the High Court of the then Bendel State to the Court of Appeal and ended in this Court finally. The claim was simply for the possession of shed No.1052 (formerly No.1338) at Igbudu Market in Warri town.

The decision to non-suit the parties was upheld by the High Court which decision was affirmed by the Court of Appeal.

One of the contentions of the appellant in this further appeal was that the trial Court having admitted that the 2nd Respondent having permitted the appellant herein to use the disputed stall during her absence, she had therefore afforded her lawful entry thereto. It was also argued that the appellant was a sub-tenant of the 2nd respondent and deemed to be the said tenant of the 1st respondent (the overlord) for that reason she was entitled to be issued with the

statutory Notice to quit as provided by the Recovery defunct of premises Law Cap 142, Laws of the defunct Bendel State (applicable to Delta State) and therefore entitled to six months Notice because 2nd respondent's tenancy was a yearly - tenancy.

Bearing in mind the fact that the dispute between the parties was initiated at the Chief Magistrate Court, pleading are hardly filed. B The matters are often time summarily dealt with. It is in view of this Court below painstakingly analysed and reconsidered the respondents' claim and come to the conclusion that the case was not founded on trespass but primarily it was a claim for declaration that the 2nd C plaintiff (2nd respondent herein) was the tenant of the 1st plaintiff (1st respondent herein) and therefore entitled to possession of the dispute market stall. So be it. The claim really before the Court was between the 2nd respondent and the Appellant herein, who was the rightful tenant of the 1st respondent. I cannot agree more. The claim D before the Court was for possession and injunction. I agree with the two Courts below that the relationship between the parties was that of tenancy relationship. The only document containing the name of the appellant and other trader was Exhibit "M" tender by PW1. The trial Court did not devalue it. The Court below rightly observed E that. If that was done, this would have assisted the Court to come to the right conclusion. PW2, the former Market Manager categorically stated in his evidence that he never allocated the stall in dispute to the appellant. PW1, a trader in the market could not state how he F came into possession of the said Exhibit "M."

These pieces of evidence were considered by the two Courts below. Thus, their concurrent findings of facts. It cannot be disturbed as they are not preserved and cannot be disturbed.

For these few remarks and more detailed given in lead judgment of my learned brother PETER-ODILI JSC. I too agree that the appeal lacks merit. It is dismissed and affirms the judgment of the lower Court. G

No order as to costs.

H

KEKERE-EKUN JSC

This appeal travelled from the Chief Magistrates Court of the former Bendel State (now Edo State), Warri to the High Court of

Bendel State, Warri Judicial Division, to the Court of Appeal, Benin Division and finally to this Court.

The plaintiffs' (now respondents') claim before the trial Magistrates Court dated 28/5/1990 as set out at page 6 of the record was as follows:

B IN THE MAGISTRATES COURTS: BENDEL STATE OF NIGERIA IN THE WARRI MAGISTERIAL DISTRICT HOLDEN AT WARRI

SUIT NO MW/31/90

BETWEEN:

C 1. WARRI LOCAL GOVERNMENT COUNCIL
2. COMFORT NIKORO AND EVELYN EWHRUDJE
CLAIM

D The 1st and 2nd plaintiffs claim against the defendant is that the 1st plaintiff is and was at all material times the owner and the 2nd plaintiff its tenant and who is entitled to the possession of Shed No. 1052 (formerly known as No. 1338) at Igbudu Market, Warri within the jurisdiction of this honourable Court.

E Sometime in 1989 the defendant wrongfully refused notwithstanding repeated requests by the plaintiffs to vacate and deliver up the said shed, she has wrongfully failed and refused to do so. The defendant threatens and intends, unless restrained by this honourable Court, to continue to remain in wrongful occupation of the said shed and to trespass thereon. Wherefore the Plaintiffs claim:

F 1. *Perpetual injunction to restrain the defendant by herself/her servants/agents and/or privies from further trespassing or otherwise however from remaining on or continuing in occupation of the said Shed No. 1052 at Igbudu Market, Warri.*

G 2. *An Order for possession in favour of the 2nd plaintiff of the said Shed No. 1052 at Igbudu Market, Warri.*

3. *N2,500.00 damages in favour of the 2nd plaintiff for trespass for the said Shed No. 1052 at Igbudu Market, Warri."*

H The plaintiffs testified and tendered Exhibits to prove that 2nd plaintiff (now 2nd respondent) was a tenant of the 1st plaintiff/respondent and had been paying her rent regularly. That the defendant (now appellant) was introduced to the 2nd plaintiff by one Queen with a request to allow her to use the shop while she (2nd plaintiff) was away from Warri looking after her sick daughter. That the stalls in

the market got burnt and the Local Government asked tenants to rebuild on their own. That she gave the defendant N1,000 to contribute to the reconstruction of the shop. That she (2nd plaintiff) continued to pay her rent to the 1st plaintiff, which the 1st plaintiff acknowledged. That on her return to Warri after her daughter died, the defendant refused to give back possession of the shop claiming that it had been allocated to her by the market master of the 1st plaintiff. B

The defendant testified but was unable to prove that she was allocated the shop. At the close of addresses, the case was adjourned for judgment. However instead of delivering judgment, the learned trial Chief Magistrate non-suited the parties on the ground that the 1st plaintiff's chairman had "*consented to re-allocate 2 stalls to both parties*". The order of non-suit was "*to allow the council re-allocate the stalls to both of them.*" C

The plaintiffs appealed to the High Court, which on 24/8/93 D allowed the appeal and granted reliefs 1 & 2 in the plaintiffs/appellants' favour but refused prayer 3.

The respondent was dissatisfied with the decision of the High Court and appealed to the Court of Appeal. The Court of Appeal dismissed the appeal on 11/2/2005 and affirmed the judgment of the High Court. The appellant is still dissatisfied and has further appealed to this Court. E

One of the appellants' contention in this appeal is that the case before the trial Court was for recovery of premises. That the respondent having admitted that she permitted the appellant to use the stall during her absence had thereby afforded her lawful entry thereto. It was further argued that in the circumstances the appellant was a sub-tenant of the 2nd respondent and deemed to be a tenant of the overlord, the 1st respondent, and that for this reason, she was entitled to be issued with statutory notice to quit as required by the Recovery of Premises Law, Cap. 142 Laws of the now defunct Bendel State (applicable to Delta State). It was further argued that the appellant was entitled to six months notice, as the 2nd respondent's tenancy was a yearly tenancy. It was further submitted on behalf of the appellant that the respondents did not adduce any evidence in support of their claim for trespass and that the Court below ought to have dismissed the claim for failure to serve the relevant statutory notices. F G H

I think it is necessary to take cognizance of the fact that the case commenced at the Magistrates Court, a Court of summary jurisdiction where no pleadings are filed. The duty of the Court was to ascertain the real nature of the dispute between the parties through the evidence adduced.

B The Court below properly carried out this function when it analysed the claim of the respondents in its judgment at page 75 lines 6 - 9 and 14 - 16 of the record as follows:

C *"I have to state that the case was not founded on trespass as such. It was primarily a claim for declaration that the 2nd plaintiff was the tenant of the 1st plaintiff and therefore entitled to possession of the said stall No. 1052 ... The claim before the Court is clear and the dominant issue was between the 2nd plaintiff and the defendant, who was the rightful tenant of the 1st plaintiff...."*

D *There was no evidence that she paid such rent to the 2nd respondent....*

E *The evidence of PW1 and PW2 shows that there was no (sic) any relationship between the 1st respondent and the appellant as they have denied ever giving the said stall to the appellant. The overlord having denied categorically putting the appellant in possession of the stall, the question of Exhibit G the quit notice being inadequate does not arise as the quit notice itself is immaterial in the absence of any relationship of landlord and tenant between the 1st respondent and the appellant. Further PW2 Newton Akuya whom*
F *the appellant claimed to have allocated the stall 1052 to her denied categorically in his evidence before the trial Court that he never allocated the stall in dispute No. 1052 to the appellant and maintained that stall No. 1052 belonged to the 2nd respondent...*

G *The claim before the Court is for possession and injunction...*

I agree with the findings of the learned judge of the Court below that the case of the respondents was that the 2nd respondent was the tenant of the 1st respondent and therefore entitled to possession of the said stall."

H I am in full agreement with the findings above that the real dispute between the parties was who, as between the present appellant and the 2nd respondent, is the lawful tenant of the 1st respondent and therefore entitled to possession of stall No. 1052.

The standard of proof in civil cases is on the balance of prob-

ability, I agree with the lower Court that the evidence preponderates on the respondents' side of the scale, there being no evidence of a tenancy relationship between the appellant and the 1st respondent or between the appellant and the 2nd respondent. The lower Court was also correct when it held that the failure of the trial Court to evaluate Exhibit M, a list of all the traders at Igbudu Market tendered by PW1, which is the only document containing the name of the appellant, would not result in a reversal of the decision of the appellate High Court, as it would not have substantially or materially affected the decision of that Court. B

The reason for the finding is that PW2, Newton Akuya, the former market master stated categorically in his evidence that he never allocated the stall in question to the appellant. Furthermore, DW 1 who is also a trader in the market was unable to state how he came into possession of Exhibit M or where it originated from. C

Concurrent findings of the two lower Courts will only be disturbed where the findings are found to be perverse, not based on the evidence on record or where a miscarriage of justice has occurred. See: Ogoala v. The State (1991) 2 NWLR (pt.175) 509; Mainagge v. Gwamma (2004) 14 NWLR (pt.893) 323; Tiza v. Begha (2005) 5 E SC 1 @ 17. D

The appellant herein has not shown any special circumstance to warrant interference by this Court.

For these and the reasons more elaborately advanced in the lead judgment of my learned brother, MARY PETER-ODILI, JSC, which I had the benefit of reading before now, and with which I concur, I find no merit in the appeal. I hereby dismiss it and affirm the judgment of the lower Court. F

I abide by the consequential orders inclusive of the order of costs made in the lead judgment. G

OKORO JSC

I read before now the lead judgment of my learned brother Mary Ukaego Peter-Odili, JSC just delivered. I agree entirely with the reasons advanced and the conclusion that there is no merit whatsoever in this appeal and, thus, deserves an Order of dismissal. My learned brother has admirably resolved all the salient issues submit- H

ted for the determination of this appeal and I do not have anything new to add. I adopt both the reasons and conclusion as mine. I also dismiss the appeal and abide by all consequential orders made therein, that relating to costs, inclusive.

B

SANUSI JSC

I had the advantage of reading in draft form, the lead judgment of my learned brother Mary Peter-Odili, JSC. His lordship had ably and painstakingly considered all the issues canvassed in this appeal by learned counsel to the parties before she arrived at her conclusion. The reasons and conclusion arrived at that this instant appeal lacks merit are agreeable to me. I adopt them in their entirety as mine and I have nothing useful to add. The appeal therefore deserves to be dismissed for want of merit and I accordingly do same. I subscribe to the order on costs made in the lead judgment.

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